

Protecting Polish Judges from Political Control

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After many years of judicial “reforms”, Kaczyński’s Poland may soon become the EU’s second authoritarian Member State (Orbán’s Hungary [ceased to be a democracy in 2019](#)), even as the European Court of Justice (“ECJ”) increasingly attempted to deal with different aspects of Kaczyński’s multi-pronged attacks on judicial independence. In [Case C-791/19](#), the Grand Chamber of the ECJ found the new disciplinary regime for Polish judges to be incompatible with EU law while in [Case C-204/21 R](#), the Vice-President of the ECJ ordered the immediate suspension of the application of the legislative provisions governing the jurisdiction of the infamous “Disciplinary Chamber”.

The Grand Chamber’s judgment is the third infringement ruling issued by the ECJ in relation to Poland’s rule of law breakdown (see previously Case C-192/18 and Case C-619/18). The Vice-President’s order is the third order suspending measures adopted – in manifest breach of the Polish Constitution one must note in passing – by current Polish authorities (see previously Case C-619/18 R and C-791/19 R). The ECJ has also issued several judgments in answer to preliminary ruling requests from Polish judges under siege (see Joined Cases C-585/18, C-624/18 and C-625/18; Joined Cases C-558/18 and C-563/18; Case C-824/18) with a total of 24 pending references yet to be dealt with. Manifestly evidencing the pan-European concern, the European Court of Human Rights (“ECtHR”) has recently stepped into the fray and [found Poland’s Constitutional Tribunal to be unlawfully composed](#). It also unsurprisingly found that [Polish authorities violated Article 6\(1\) ECHR requirements](#) when they undertook a purge of the senior leadership of Poland’s ordinary courts in 2017-18. As of today, the ECtHR has prioritised more than [30 rule of law related complaints](#) mostly lodged by Polish judges targeted by Polish authorities.

Poland’s rule of law breakdown, as [recent developments show](#), is only accelerating. The Member State has already, following Professor Kelemen, already [effectively left the EU legal order](#). To succinctly frame a combined analysis of the ECJ’s judgment and order, which add up to a total of 492 paragraphs, this post will focus on the most unprecedented aspects of both.

The ECJ’s assessment of Poland’s Soviet-reminiscent disciplinary regime for judges

Poland’s new disciplinary regime for judges forms part of an autocratic agenda implemented by current ruling coalition which, in manifest violation of the EU Treaties but also the Polish Constitution, endeavours to put an end to judicial independence and reinstate [what amounts to a “Soviet-style justice system”](#).

Unsurprisingly, the ECJ found each element of this new regime submitted to its attention by the Commission, supported by the governments of 5 Member States (Belgium, Denmark, Netherlands, Finland, Sweden), to be wholly incompatible with EU law.

The first and welcome feature of the Court's rich, meticulous and compelling judgment is the systemic framework of analysis employed by the Court in answer to a systemic attack on judicial independence. While this is not the first time the Court has done so (see e.g. C-824/18), the Court's systemic analysis is particularly thorough with its contextual analysis taking account i.a. the *wider context* of the changes made to the organisation of the judiciary, the *particular context* in which e.g. the Disciplinary Chamber ("DC") was created as well as the effect of their *combination* and *simultaneous* introduction of the different changes made by Polish authorities.

For the first time, the ECJ has described the situation of the [\(fake\) judges](#) of Poland's (sham) DC as amounting to a "structural breakdown" with regard to judicial independence (perhaps inspired by a [recent article co-authored by yours truly](#)) which no longer makes it possible i.a. "to dispel any reasonable doubt in the minds of individuals as to the imperviousness of the Disciplinary Chamber to external factors and its neutrality." To all intents and purposes, one may call it as it acts: a kangaroo court.

For the first time too, the ECJ has found a violation of the principle of non-regression in relation to the DC, taking into account i.a. the role played by the new ([unconstitutionally established](#)) National Council of the Judiciary ("KRS" in Polish) in the appointment of the members of the DC. One may regret the ECJ's arguably excessively euphemistic language in this context to refer to the [premature and manifestly unconstitutional termination](#) of the term of office of the members which had, until that point, made up that body. However, the ECJ did subsequently stress the lack of independence of the KRS before holding that the DC "constitutes a reduction in the protection of the value of the rule of law". This is the first time the ECJ has found a violation of the EU non-regression principle first outlined as regards judicial independence in [the Maltese Judges ruling](#) of 20 April 2021.

For the first time as well, the Court has directly and extensively dealt with the notion of 'deterrent effect' (also known as [chilling effect](#)) to establish a violation of the principle of judicial independence in an infringement case. In agreement with the Member States which intervened in support of the Commission, the Court held that Polish authorities have created a disciplinary regime which is "being used in order to create, with regard to those judges who are called upon to interpret and apply EU law, *pressure and a deterrent effect* [our emphasis], which are likely to influence the content of their decisions". In this context, the ECJ also found a *second* violation of the principle of non-regression while also holding that the national measures relating to the disciplinary liability of judges, "having regard to their wording alone", violate the requirements of clarity and precision previously outlined in the [Romanian Judges ruling](#) of 18 May 2021.

In another first, the Commission had finally asked the ECJ to review a specific aspect of the disciplinary regime in light of [the right to a tribunal established by law](#). The Commission however did so in a very (arguably excessively) limited way. In other words, it regrettably did not ask the ECJ to review “the conditions under which the Polish disciplinary courts are established or the judges which make up those courts are appointed, but the conditions under which” any particular disciplinary court is designated in relation to specific disciplinary proceedings conducted in respect of a judge. A missed opportunity to tackle the issue of [Poland’s ‘fake judges’](#) in an infringement context. In any event, the ECJ, for the first time, found a violation of the “established by law” criterion in this context due to the arbitrary power conferred on the individual presiding the DC.

In yet another unprecedented development, the Court held that relevant national *procedural* rules were designed in a such as a way as “to increase still further the risk of the disciplinary regime applicable to those whose task is to adjudicate being used as a system of political control of the content of judicial decisions”. In this context, the Court stressed that Polish judges are right “to *fear* [our emphasis], if they rule in a particular way in the cases before them, that disciplinary proceedings will be brought against them which ... fail to provide guarantees capable of meeting the requirements of a fair trial.” This naturally amounts to yet another violation of the EU requirements relating to judicial independence.

Last but not least, in relation to Article 267 TFEU, the Court has essentially [moved away from its previous unwise distinction](#) between preliminary disciplinary investigations and formal opening of disciplinary investigations. Positively, the Court now fully accepts that the mere “opening of investigations concerning decisions whereby Polish ordinary courts have submitted requests for a preliminary ruling” to the ECJ is not compatible with EU law. Again and fittingly, the Court relies i.a. on the concept of chilling effect in this context.

One arguably very minor yet frustrating aspect: the Court’s continuing use of “reforms” to describe deliberate, sustained, unlawful attacks on judicial independence speaking of which let us now focus on the ECJ’s second suspension of [Poland’s disciplinary “Star Chamber”](#).

The ECJ’s second suspension of Poland’s “Star Chamber”

On 14 July 2021, the day before the Court’s judgment in C-791/19, the Vice-President of the Court ordered the second suspension of the Disciplinary Chamber (“DC”). On 8 April 2020, the Court’s Grand Chamber had already granted the Commission’s request to order the suspension of the application of the national provisions relating to the powers of this (manifestly [unconstitutional](#)) body with regard to disciplinary cases concerning judges. This order was both significant and unprecedented: “[significant, because it makes clear that EU law prohibits Member States from setting up national disciplinary bodies which, themselves, fail to satisfy the guarantees inherent in effective judicial protection](#)” and “[unprecedented, to the](#)

[extent that the ECJ has demanded the immediate suspension \[...\] of the processing of all disciplinary cases regarding judges.”](#)

Following the ECJ order of 8 April 2020, instead of continuing to persecute independent judges on the back of formal disciplinary proceedings, Polish authorities started suspending judges they didn't like by initiating unfounded criminal charges against them and getting them suspended by the DC via the lifting of their judicial immunity. While one may argue this amounted to a manifest violation of the ECJ order (ECJ Judge Safjan [stated as much](#)), the Commission disagreed and refused to ask the ECJ to impose a dissuasive daily penalty payment. Instead, the Commission chose to start from scratch [by belatedly raising this issue](#) within the framework of its latest infringement procedure aimed at Poland's muzzle law (C-204/21). The Commission did however do the job in this instance with the Court ordering the immediate suspension of the national (unconstitutional) legislative provisions allowing the DC to lift the immunity of Polish judges with a view to bringing criminal proceedings against them, and the consequent temporary suspension from office and the reduction of their salary.

Conceptually, the most significant aspect of the Court's order of 14 July 2021 is the first explicit clarification that decisions regarding the lifting of judicial immunity are directly connected to the status and conditions of exercise of judicial functions. As such, this type of decisions cannot fall within the jurisdiction of a body which itself lacks independence.

Practically, the most significant aspect of the Court's order is the suspension of the DC for any case regarding any judge as well as the first ever suspension (albeit to a limited extent) of the second new chamber created by current Polish authorities known as the Chamber of Extraordinary Control and Public Affairs (CECPA) and which, similarly to the DC, consists entirely of [fake judges](#). This aspect has largely gone unnoticed. To oversimplify, in open violation of [ECJ's Simpson ruling](#) and to prevent (independent) Polish judges from assessing whether courts, chambers or panels involving ruling coalition's appointed "judges" are still tribunals established by law, the muzzle law gave the CECPA the exclusive competence to undertake this type of check. In other words, CECPA's (fake) "judges" were put in charge of assessing whether other (fake) "judges" are not in fact (fake) "judges"... The ECJ has now suspended the activities of the CECPA in this respect due to the serious doubts surrounding its independence from political interference. Remarkably, in this context, the Polish government has (accidentally) admitted (see § 185) that a Polish judge applying the EU legality and independence checks required under Article 19(1) TEU/Article 47 CFR could result in disciplinary proceedings...

Another key but not unprecedented aspect of the Court's order (see previously C-619/18 R) is that it suspends the effects of decisions *already* taken by the DC on the lifting of judicial immunity. This means for instance that [Judge Igor Tuleya](#) can immediately return to work.

Conclusion

The judgment and order of the ECJ are as meticulous as they are compelling. Unsurprisingly, in light of their previous record of systemic violations of national and European rulings, most recently resulting in Poland's unconstitutional Constitutional Tribunal openly disregarding a [judgment of the European Court of Human Rights regarding its unlawful composition](#), Polish authorities and their puppet "courts" have now crossed the Rubicon and under the *pretext* of defending the Polish Constitution, [are now openly refusing](#) to recognise the jurisdiction of both [the ECJ](#) and the [ECtHR](#) over judicial independence matters.

On the weight of such decisions, we must now look to action by the Commission. When dealing with a bad faith, rogue regime engaged in an industrial scale violation of judicial independence, "dialogue" is just an irresponsible waste of time. One may only hope the Commission will quickly wake up and smell the EU-legal-disintegration coffee and promptly apply for a dissuasive penalty payment in C-204/21 R, launch an Article 260 TFEU action regarding C-791/19, initiate an Article 258 TFEU action against [the rogue "Constitutional Tribunal"](#) (EU Member States can do so as well) as well as activate the EU's new [Rule of Law Conditionality Regulation](#).

